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IN THE

Supreme Court of the United States

October Term, 1958

No. 146

ELLIE P. AGHNIDES,

Petitioner,

v.

MARGOT E. AGHNIDES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Preliminary Statement and Questions Presented

The New York courts have found that:

(1) petitioner and respondent are residents and domiciliaries of New York;

(2) in a prior New York action granting respondent a separation and alimony, petitioner's counterclaims for a separation on the ground of cruelty and an annulment claiming fraud were dismissed and the allegation of fraud was expressly rejected;

(3) the issues tendered by petitioner's Indiana action for divorce or annulment are those already adjudicated in New York and the continuance of this Indiana action could only be for the purpose of evading the laws of New York and petitioner's obligations under the New York judgment of separation.

On these findings, petitioner's maintenance of the Indiana action has been enjoined.

The prolix questions in the petition turn on the assumptions that (1) respondent's innocence of fraud was not established in the New York separation action and (2) respondent has not been properly found to be a New York resident. It is readily demonstrable in the record (see pp. 3, 5, 6-7, 12, *infra*) that these assumptions are in fact erroneous. Thus, the questions actually presented are:

1. Whether, in the prior New York action for separation, petitioner's claim that respondent had been guilty of fraud was rejected by the findings of fact.

2. Whether New York has power to enjoin its resident from proceeding with a divorce action in another state where a previous New York separation action has determined all of the issues between the parties and the foreign suit is an attempt to evade the laws of New York and the obligations created by the New York judgment.

3. Whether the New York courts could finally determine that respondent was a resident of New York where an Indiana court had made an interlocutory ruling denying her plea in abatement and postponing to the merits her claim of non-residence in Indiana.

4. Whether the New York separation action had finally determined the issues petitioner sought to litigate in Indiana.

5. Whether New York's statute providing that cohabitation with knowledge condones fraud and precludes annulment is unconstitutional—a question not raised or considered below.

Statement of Facts

Petitioner, a resident of New York for many years, was married to respondent in Indianapolis, Indiana, on July 19, 1952. Immediately after the marriage, the parties came to New York City, departed for a honeymoon, and returned in September 1952 to New York City, where they took up residence at the Hotel Dorset (Pet. App. B, p. 29; R. fols. 489-91). Except for short visits to the home of her parents in Indiana, respondent has resided and worked in New York ever since (Pet. App. B, p. 29; R. fols. 491, 524-27).

Following a quarrel early in October of 1952, respondent accompanied her mother to Indiana for "a fortnight's visit" with her parents. Returning to New York, respondent made efforts with her father and later through attorneys to effect a reconciliation, but these efforts were rejected by petitioner (Pet. App. C, pp. 51, 53).

The first New York action and the action in Indiana.

When it appeared that a reconciliation was impossible, arrangements were made for petitioner's attorney to accept service of respondent's complaint, verified on November 29, 1952, in a New York separation action upon the grounds of abandonment and non-support. While respondent's complaint, delivered to petitioner's attorney on December 18, 1952, was in the latter's hands, petitioner instituted a suit for divorce in Indiana by leaving a copy of his complaint at the home of respondent's parents on December 20, 1952 (Pet. App. B, p. 26; R. fols. 563-67, 685-87). Shortly thereafter, petitioner added to his Indiana action a claim for annulment for fraud, alleging that respondent wife had never intended to bear children (Pet. App. B, p. 26).

Upon his return to New York, on December 22, 1952, petitioner was personally served with the summons and complaint in the New York separation action (Pet. App. B, p. 29). Petitioner, both in Indiana and New York, moved for a stay of the New York action. Both motions were denied. In support of his New York motion, petitioner avowed that the issues raised by his complaint in Indiana were "the same in substance" as those raised in the New York action (Pet. App. B, p. 30; R. fol. 498).

Meanwhile, respondent had appeared specially in the Indiana action and filed a plea in abatement, urging that service at her parent's home was not service upon her since she had not been an Indiana resident for one year prior to the service as required by Indiana law. Petitioner urged successfully that this issue of residence was tied to the basic question whether the marriage was a nullity, so that the question presented by the plea in abatement should await determination upon trial. The plea in abatement was overruled and respondent then appeared generally in the Indiana action (Pet. App. B, p. 29; R. fol. 493). That action never reached the trial stage.

When the New York separation action came on for trial in October 1953, petitioner amended his answer to set up counterclaims for separation upon the ground of cruelty and for annulment for fraud (Pet. App. B, p. 38; R. fol. 495).

The trial court in New York dismissed respondent's claim for separation and granted petitioner's counterclaim for separation upon the ground of abandonment (Pet. App. C, pp. 52-56). Rejecting petitioner's counterclaims for separation on the ground of cruelty and for annulment, the trial court found that petitioner had been guilty of fraud in that she had not intended to bear children, but that petitioner had condoned the fraud by cohabitation after learning of it (*Id.*, pp. 55-56).

On cross-appeals, the Appellate Division specifically reversed the finding of fraud, eliminating it from the case, and substituted findings that respondent had "made an unequivocal and unconditional offer to return" to petitioner and had "continued to seek a reconciliation and a preservation of the marriage" (Appendix, *infra*, pp. 12, 13).* Modifying the trial court's decision, the Appellate Division dismissed petitioner's counterclaim for separation, and otherwise affirmed (Pet. App. C, p. 52).

On cross-appeals, the New York Court of Appeals directed a judgment of separation in favor of respondent and affirmed the dismissal of petitioner's counterclaims (Pet. App. C, pp. 50-51). As to petitioner's counterclaim for annulment, the Court of Appeals held (Pet. App. C, p. 51) that

> "the Appellate Division was warranted in affirming Special Term's dismissal upon the ground that the evidence adduced was insufficient to establish that plaintiff possessed a pre-marital intention not to bear children; and, in any event, even if plaintiff had been guilty of such fraud, it would have been condoned by the subsequent cohabitation of the parties after defendant learned the facts constituting the alleged fraud (Civil Practice Act, § 1139)."

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* The findings and reversals of findings referred to in the text appear at pages 498-500 of the record in the New York separation action, which petitioner has certified to this Court. They were made in the Appellate Division's Order of Modification and Affirmance as Modified, which is wholly overlooked by the petitioner here. Since this oversight is critical—and its correction largely dispositive of the questions mistakenly tendered by the petition for certiorari (see pp. 1-2, *supra*, pp. 6-7, 10, *infra*)—we print the Order as an Appendix to this brief for the convenience of the Court.

The present action for injunction.

Following the judgment in the first New York action granting respondent's prayer for a separation and denying petitioner's counterclaims alleging cruelty and fraud, respondent brought the present suit to enjoin continuance of petitioner's attempt to relitigate the issues petitioner had described as being "the same in substance" as those raised in the New York action (Pet. App. B, p. 30; R. fol. 498).

Holding that the issues in the Indiana suit had already been determined in New York and that petitioner was attempting to evade the New York judgment of separation, the trial court granted the injunction after trial (Pet. App. B, pp. 29-37). The Appellate Division affirmed, holding it sufficient that respondent was not an Indiana resident, that Indiana lacked jurisdiction, and that it was therefore unnecessary to reach the further grounds for injunctive relief adopted by the trial court (Pet. App. B; pp. 26-28). Both the Appellate Division and the Court of Appeals denied leave to appeal to the latter (Pet. App. B, pp. 46-47).

ARGUMENT

1. Prolonging his effort to relitigate in Indiana the issues which were litigated fully, expensively and at length in New York, the petitioner plants his claim upon a palpably erroneous reading of the fact findings in New York. The basic and pervasive premise of the petition (see Pet. 3-4, 12-13, 16-18, 19-20) is the assertion that the New York separation action found respondent guilty of fraud in contracting the marriage, but held that the fraud had been condoned. This fallacious assumption derives simply from petitioner's failure to read the findings and reversal of findings by the Appellate Division in the separation action.

Those findings specifically and explicitly rejected the charge of fraud (*supra*, p. 5; *infra*, p. 12). Omitting that crucial fact, the petition is built entirely on error. Correction of the error leaves nothing which warrants the consideration of this Court.

Highlighting his own error, petitioner observes (Pet. 17) that the New York Court of Appeals is without power to make original findings of fact; so that that Court could not itself have found in the first instance that respondent had been innocent of fraud. Of course, petitioner is correct in this observation. What he overlooks, however, is the fact that precisely such a finding had been made by the Appellate Division (which undisputedly has power to reverse and make new findings of fact) and was merely affirmed by the Court of Appeals.

2. Having rejected petitioner's claim that the marriage was a nullity because of fraud, the New York courts properly found that, like her husband, respondent was a citizen and resident of New York at all times after July 19, 1952 (Pet. App. B, p. 29; R. fols. 489-91). This was true not only because of the rule making the husband's domicile the wife's, but also because of the physical facts of respondent's residence and employment in New York in the years since 1952 (R. fols. 491, 524-27).

Accordingly, petitioner's first question (Pet. 3)—whether both parties must be citizens and residents of the enjoining state to warrant an injunction of the type in issue—is answered on the facts.

There is a suggestion (Pet. 3, 13-15) that even given the facts of residence and the fact that the out-of-state action seeks to relitigate issues already resolved in the domiciliary state, there may *never* be an injunction where the proceeding in the foreign state is "an action for di-

force." For at least two reasons the suggestion affords no basis for certiorari:

(a) Because no such broad contention was made below (cf. Pet. App. B, p. 33).

(b) Because the contention is, in any event, without merit. To cite only the case of *Cole* v. *Cunningham*, 133 U. S. 107, invoked by petitioner, it has long been familiar law that a state may in proper cases enjoin out-of-state litigation by its citizens. No case cited by petitioner denies this power in matrimonial cases. On the contrary, this case—where New York has determined the issues petitioner would raise in Indiana, where petitioner seeks to escape New York's judgment of separation by relitigation in Indiana, and where New York's interest in the marital *res* is clear and substantial—illustrates perfectly the need and propriety of injunctive relief.* Decisions in many states over the years reveal the exercise of this familiar and salutary power.

3. Petitioner urges faintly, as a "viable position" (Pet., 21), that New York denied full faith and credit when it found respondent to be a New York resident after the Indiana court had made an interlocutory ruling denying respondent's claim of non-residence in Indiana. The short answers are that:

(a) Petitioner himself urged in Indiana that the question of residence turned on his claim of fraud—*i.e.*, if he proved the marriage a nullity, respondent re-

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* *E.g.*, *Kahn* v. *Kahn*, 325 Ill. App. 137; *Usen* v. *Usen*, 136 Me. 480; *Cherry* v. *Cherry*, 253 Mass. 172; *Kempson* v. *Kempson*, 58 N. J. Eq. 94, *aff'd*, 63 N. J. Eq. 783; *Garvin* v. *Garvin*, 302 N. Y. 95; *Borda* v. *Borda*, 44 R. I. 337; see Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce*, 2 Law & Contemp. Prob. 370, 373-90 (1935).

mained an Indiana resident—and that the question should therefore be postponed to the trial.

(b) In any event, as the New York trial court held (Pet. App. B, p. 32), the interlocutory ruling in Indiana never became final there and is entitled to no greater finality in New York.

4. Changing his earlier position that the issues resolved in New York were substantially the same as those presented in Indiana (*supra*, pp. 4, 6), petitioner argues that the questions of cruelty and fraud are different in Indiana and that the New York decision is wrong, therefore, in its holding of *res judicata* (Pet. 6, 20). As to the cruelty issue, this rests on the slim reed of a lawyer's view that the Indiana courts are generous in holding evidence sufficient to show cruelty (Pet. 22, R. fols. 649-51). This hardly justifies the claim that, having failed to prove cruelty in New York, petitioner is entitled to allege the very same facts and try again in Indiana.

As to the annulment problem, petitioner says condonation is not mentioned in the Indiana statute, so that the alleged finding of condonation in New York does not resolve the issue posed in Indiana (Pet. 20). The most obvious trouble with this argument has already been noted (*supra*, pp. 6-7); the New York judgment denying petitioner's annulment claim rests, not on condonation, but on a specific rejection of the claim of fraud.

Moreover, it would be clear in any event that, as the trial court held (Pet. App. B, pp. 34-36), petitioner is not free to evade the barrier of *res judicata* on his claim that Indiana law is different and might award him a better result. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 445-6; *Harding v. Harding*, 198 U. S. 317. Petitioner himself chose to present as counterclaims and try out in New

York his prayer for an annulment for fraud or for a separation on grounds of cruelty. Nothing could be clearer than the propriety of preventing the harassment and evasion entailed in his proposal to repeat the effort in Indiana.

5. Finally, there is an insubstantial contention (Pet. 6, 20-21), not raised below, that the New York law on condonation is "an insult to common sense, a contradiction in terms" (Pet. 21), and therefore unconstitutional. There is no need to correct here petitioner's misunderstanding of the plain and familiar New York rule. It is enough to note again that the condonation provision is never reached since petitioner's claim for an annulment was rejected on the ground that he had not proved the alleged fraud.

CONCLUSION

The decision below is clearly correct and there is no conflict. Resting primarily upon a neglect of the fact findings in the New York separation action, the petition presents no issues warranting review by this Court. The petition should be denied.

Respectfully submitted,

HAROLD H. LEVIN
Attorney for Respondent

APPENDIX

Order of Modification and Affirmance as Modified in the New York Separation Action

(Pages 497-501 of record in separation action filed in this Court by petitioner (Pet. 7))

The above-named MARGOT E. AGHNIDES, plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, First Department, from so much of the judgment of the Supreme Court entered in the office of the Clerk of the County of New York, on the 8th day of January, 1954, in the above-entitled action as dismissed plaintiff's complaint for separation and granted judgment in favor of defendant on his counterclaim for a separation, and a cross appeal having been taken by Elie P. Aghnides, defendant in this action, from that part of said judgment which dismissed, upon the merits, defendant's counterclaim for annulment of the marriage between the parties, and said appeals having come regularly on to be heard, and after hearing Harold H. Levin, Esq., of counsel for plaintiff-appellant-respondent, and Harold H. Corbin, Esq. of counsel for defendant-respondent-appellant, and due deliberation having been had, and upon the decision of the Court heretofore filed herein, it is

ORDERED, that the judgment appealed from be and the same hereby is unanimously modified, upon the law and the facts, so as to dismiss defendant's several counterclaims for separation, and said counterclaims be and the same hereby are dismissed upon the merits, and as so modified the said judgment be and the same hereby is affirmed, without costs; and it is further

ORDERED, that the following Findings of Fact contained in the decision of the Court below be and the same hereby are reversed on the facts and disallowed:

1. That at a meeting of plaintiff, her father and defendant on October 23, 1952, defendant inquired of plaintiff whether her offer to return to him meant that she was willing to bear children and that said question was not answered by plaintiff (ff. 73-75).

2. That plaintiff had a permanent attitude on the subject of bearing children, that she did not intend to bear a child by defendant and that such attitude and intent had not changed at the time she offered to return to defendant (f. 82); and it is further

ORDERED, that the following additional Findings of Fact be and the same hereby are made and allowed in place of the Findings of Fact so reversed and disallowed;

1. On October 3, 1952, plaintiff, with the consent of defendant, spent the night with her mother at the Hotel Westbury in New York City, and on the following day they departed for Indianapolis, Indiana, without defendant, for a fortnight's visit with plaintiff's parents.

2. Ten (10) days after plaintiff's departure for Indianapolis, plaintiff, by letter dated October 16, 1952, urged upon defendant the preservation of the marriage between the parties and made an unequivocal and unconditional offer to return to him.

3. Defendant's reply, dated October 20, 1952, did not respond favorably to plaintiff's said offer and proposal.

4. Upon receipt of defendant's letter dated October 20, 1952, plaintiff, accompanied by her father, returned to

New York City on October 23, 1952 and met with defendant. At such meeting plaintiff and her father sought to effect a reconciliation and plaintiff attempted to return to defendant.

5. Between said meeting on October 23, 1952 and the commencement of this action in December of 1952, plaintiff, through her attorneys, continued to seek a reconciliation and a preservation of the marriage.

6. Defendant, personally and through his attorney, refused to accept plaintiff's offers to return and advised plaintiff and her attorneys that a reconciliation was not acceptable to him; and it is further

ORDERED, that the following conclusions of law of the Court below be and the same hereby are unanimously reversed and annulled:

1. That plaintiff's fortnight's visit with her parents in Indianapolis constituted an abandonment of defendant (ff. 75, 76, 83, 84);

2. That plaintiff's unchanging attitude on the subject of bearing children established a fraud on defendant (f. 82);

3. That defendant was justified in rejecting plaintiff's offers to return to him because they were made with a material reservation (f. 82);

4. That defendant was entitled to a judgment of separation upon the ground of abandonment (f. 88); and it is further

ORDERED, that the following conclusion of law be and the same hereby is made and allowed:

Plaintiff is entitled to judgment dismissing each of defendant's counterclaims for separation and annulment on the merits.

Let judgment be entered accordingly.

ENTER;

BB

(Filed September 14, 1954.)

(The judgment in accordance with the foregoing order was entered on September 17, 1954. See pp. 502-506 of the record in the separation action.)